UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

AEROTEK, INC.

and

Cases 17-CA-071193 17-CA-075605 17-CA-078720

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 22, affiliated with the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

Michael E. Werner, Esq., for the General Counsel.

William A. Harding and Kelly M. Ekeler, Esqs, Harding and Shultz, P.C., L.L.O., Lincoln, Nebraska, and Mark Freeman, Freeman and Freeman, P.C. Rockville, Maryland, for the Respondent.

Lori Elrod, Esq., Blake & Uhlig, P.A., Kansas City, Kansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Omaha, Nebraska on October 29 and 30, 2012 and January 3, 2013. Local 22 of the International Brotherhood of Electrical Workers (IBEW) filed the charges in these matters on December 21, 2011, March 1, and April 12, 2012. The General Counsel issued the consolidated complaint which is before me on August 28, 2012.

The General Counsel alleges that Respondent violated Section 8(a)(1) on several occasions by telling employees that their wages and other terms and conditions of employment were confidential and that they were prohibited from discussing wages and other terms and conditions of employment with other employees. He also alleges that Respondent violated Section 8(a)(3) and (1) in refusing to consider for hire and refusing to hire Brett Johnson since about August 1, 2011 and refusing to consider for hire and refusing to hire Tim Hendershot, Tom Jankowski and Alan Winge since about September 1, 2011.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

JURISDICTION

Respondent, Aerotek, Inc., a corporation, with headquarters in Hanover, Maryland, near Baltimore, provides temporary personnel and job screening services in various locations in a number of states, including its facility in Omaha, Nebraska. At its Omaha facility it annually performs services valued in excess of \$50,000 in States other than Nebraska. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, IBEW Local 22, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent has 6 or 7 different divisions operating from the Omaha office. Only one of these, the Environmental and Engineering Division places employees in the construction industry. The Union and Aerotek are competitors with regard to placement of journeymen and apprentice electricians. The Union provides labor to employers, as does Aerotek and other employee staffing companies. At least with regard to some employers, companies such as

Aerotek provide a convenient employee staffing alternative to establishing relationships with labor organizations. Indeed, when testifying in the instant hearing, Brett Johnson a full-time organizer with IBEW Local 22, stated the number of newspaper advertisements for electricians has been steadily diminishing over the past ten years. Johnson believes that, "the result is that more and more contractors are not advertising themselves, but using staffing companies, in my opinion, to screen out union members," Tr. 219.

On July 27, 2011, Kacie Woodley, an intern working as a recruiter for Aerotek, called Brett Johnson. Woodley asked Johnson if he was interested in employment. Woodley made the following entry into Brett Johnson's profile in Aerotek's Recruiter Work Space (RWS) system:

Brett is looking to make at least 30/hour. He is the membership coordinator with local 22 union. He is sending me his updated résumé is always open to hearing about new opps.

G.C. Exh. 34.1

35

40

30

5

10

RWS is a database containing information on essentially any individual who has had contact with Aerotek relating to potential employment. Johnson had a profile in this system prior to July 2011. His profile was created in October 2009, The profile may be related to the fact that in September 2007 Aerotek settled an unfair labor practice charge filed by IBEW Local 22 which alleged that it had refused to consider Johnson for hire and had refused to hire him because of his union activity. Aerotek paid Johnson \$4,445.20 as part of this settlement.

¹ Johnson testified that he did not tell Woodley that he was looking to make at least \$30 per hour. I credit his testimony as it is consistent with the email he sent to Aerotek on August 8, 2011, G.C. Exh. 38, and his uncontradicted account of his conversation with Aerotek account manager Jacob Shank the same day. Assuming that Woodley, who did not testify, simply made a mistake, Johnson corrected any misunderstanding of what he would accept on August 8.

Woodley emailed Johnson, asking for his résumé and telling him that she would "keep an eye out for higher-level electrical positions." Johnson replied on the morning of July 28, 2011, stating, "I like working worth (sic) the tools and any electrical position will do apprentice or journeyman anything I can do to get in to organize electrical contractors in the union." He also submitted his résumé.

Johnson then contacted Local 22 member Joe Stock and asked him to apply to Aerotek. Stock contacted Aerotek recruiter Daniel Mehmen on July 28. Mehmen interviewed Stock and then emailed Les Shallberg, the owner of Fremont Electric Company that evening, informing Shallberg that Stock was available to start work the following Monday. Mehmen informed Shallberg that:

For the last 4 months Joe was working for a residential and commercial contractor in Blair NE but before that worked for Centaur Electric. Joe's foreman from Centaur said he was very reliable and very knowledgeable. If they had more work he would have been glad to keep Joe working for them. Prior to that Joe was a Journeymen electrician for the IBEW for 4 years and left to go to Centaur...

20 G.C. Exh. 6.

5

10

15

25

30

35

40

The reference from Centaur that Stock gave Mehmen was phony. He provided Mehmen with Brett Johnson's telephone number. Johnson provided the favorable reference posing as "Larry," Stock's foreman at Centaur. There was no indication from Stock's employment application, G.C. Exh. 3, p. 127 or communicated by Stock during his interview that he had any relationship with the IBEW in August 2011. I discredit Mehmen's testimony that he knew Stock was a union supporter when he placed Stock with Freemont Electric. Mehmen's email to Fremont's owner, quoted above, indicates that Mehmen understood that Stock had a relationship with the IBEW in the past but was no longer associated with the Union. Mehmen did contact Stock regarding a non-bargaining unit, non-electrical job in December 2011, after Stock had identified himself as an IBEW member, Tr. 388.

Stock began work at Freemont as a general laborer on August 1 at \$21 per hour. He worked for Freemont until October 17, 2011. Stock's foreman told Mehmen that Stock did a great job while working for him, G.C. Exh. 8.

On August 1, 2011, Respondent placed Brandon Strine with Fremont Electric at a wage rate of \$16 per hour. Although Strine had worked for a union contractor from May to September 2008 as a temporary member of Local 22, he has had no relationship with the Union since September 2008.

On August 5, Aerotek posted a notice for an electrician with 3 years or more of experience in electrical and commercial buildings for a client in Blair, Nebraska. Among the required skills in this announcement was the possession of a journeyman's license, G.C. Exh. 2, p. 2.

On August 8, Johnson sent the following email to Aerotek recruiter Daniel Mehmen, in response to this and other postings:

I have sent my resume to Kacie Woodley with Aerotek on 7/27/2011 and informed her that I would take any position, apprentice or journeyman and have had no offer of a position yet. I couldn't help but notice the multiple job postings available with Aerotek and thought that the one with your client in Blair would be a good fit as I have industrial experience. I like the idea of working with larger contractors allowing me time to expose more electricians to the IBEW...

G.C. Exh.. 38.

Aerotek account manager Jacob Shank called Johnson the same day, after Johnson sent this email. Shank told Johnson that Woodley no longer worked for Aerotek and had not passed on Johnson's information to him.² Shank said Respondent was looking only to place apprentices. Johnson replied that he would accept any position, as a journeyman or apprentice. Shank said he would consider Johnson for eligible jobs in the future.³

15

20

25

10

5

On August 12, 2011, Johnson uploaded the résumés of union members Tim Hendershot, Tom Jankowski and Alan Winge into the database for Career Builder. As a result Respondent's RWS system automatically entered them as employment applicants with Aerotek, G.C. Exh. 34. On the résumés of all three, the fact that there were volunteer union organizers, as well as licensed journeymen electricians, was prominently noted, G.C. Exh. 39.

Jankowski is the vice-president of Local 22, an elected position and is a member of the Union's Executive Board. He regularly works as an electrician. Hendershot and Winge also work regularly as electricians. Neither holds any position with the Local. As of August 12, Jankowski was working reduced hours at Omaha Electric, a unionized employer. Winge was unemployed as was Hendershot. Their résumés did not indicate whether or not they were currently employed.

All three had volunteered to participate in the Union's salting campaigns at non-union contractors. On August 5, 2012, Winge and Brett Johnson submitted Winge's resume to Sentry Engineering in Mecina, Iowa. At that time, Winge authorized Johnson to submit his resume to other non-union contractors for salting purposes. Winge did not know specifically that it would be submitted to Aerotek, Tr. 330-31. However, Johnson specifically asked Hendershot and Jankowski if he could submit their resumes to Aerotek. They specifically authorized Johnson to do so, Tr. 314, 338. All three understood that the Union could order them to quit their non-union employment if it did not serve the Union's organizing interests.⁴

² This was a bit disingenuous since Woodley had entered her notes of the July 27 conversation into Respondent's RWS system.

³ Johnson's account of this telephone conversation was not contradicted by Shank. I therefore credit it. Johnson and Shank met in February 2011, after recruiter Daniel Mehmen initiated contact with IBEW Local 22 through Johnson. Shank and Mehmen met with Johnson for about 30 minutes at the Union Hall at that time.

⁴ Johnson testified that salting agreements with Local 22 members have on one or more occasions been cancelled because the member decided to stay at the non-union contractor and drop his membership with the Local. Thus, salting can be a two-edge sword if a member decides he or she would be likely to be employed more consistently if he or she terminated his union membership.

I find that Respondent cannot legitimately rely on this fact as a defense for not hiring or considering

As of the October 30, 2012 hearing session, Winge had been employed with a Union contractor since April 2012; Hendershot had been employed by a union contractor for three months. Jankowski was laid by Omaha Electric and has worked several jobs of short duration since his lay-off. With the exception of one voice mail message left by Aerotek recruiter Curtis Coatman for Hendershot on February 24, 2012, neither Johnson, Hendershot, Jankowski nor Winge ever heard from Aerotek.

Little over three weeks from the conversation between Shank and Johnson, on August 30, 2011, Respondent placed journeymen electricians, David Myhr and Jeffrey Thomsen with Fremont Electric at a wage rate of \$20 per hour. So far as this record demonstrates neither Myhr nor Thomsen has ever had any relationship with Local 22 or any other union. Respondent has not offered any specific evidence as to why it placed Myhr and Thomsen, as opposed to any of the alleged discriminatees. As Joint Exhibits 4 and 6 and Exhibit R-16 demonstrate, Aerotek placed many other employees; journeymen and apprentice electricians, with contractors after August 8.

Johnson emailed Aerotek recruiter Daniel Mehmen on November 30, 2011, reiterating his interest in "any electrical construction position available," G.C. Exh. 40. Aerotek did not respond to this email. On December 6, 2011, Aerotek placed four apprentices with IES Commercial at wage rates of either \$16 or \$17 per hour. On December 16, 2011, Aerotek placed Brandon Strine at Weston Solutions at a rate of \$23.39 per hour.

Between January 16, 2012 and February 17, 2012, Aerotek placed a number of journeymen and apprentices with Interstates Construction Company. Interstates was performing work at a Tyson Foods' plant in Council Bluffs, Iowa. Among the journeymen hired for Interstates⁵ during this period are the following individuals, with their date of hire and wage rate:

	Warren Kennedy	January 16	\$14
30	Mark Mesenback	February 6	\$23
	Carlos Ramos	February 6	\$23
	Jimmy Coats	February 20	\$23
	Julio Juarez	February 20	\$25
	Duane North	February 20	\$23
35	Jack Shelly	February 20	\$23
	Aaron Flores	February 23	\$17
	Jesus Flores	February 23	\$17
	David Erwin	February 27	\$25
	Jason Perry	February 27	\$23
40	Kelly Jansen	March 5	\$24

5

20

the discriminatees for hire. Respondent was hiring primarily for projects of short duration and in fact hired employees such as Kyle Modlin and Jason Darnold, who informed Aerotek that they intended to work elsewhere within a few months.

⁵ All these individuals apparently were assigned to Interstates' Tyson Foods project, Exh. R-16.

Steven Meling March 5 \$24 Adrian Sterns March 5 \$24

10

15

20

25

30

35

40

45

While the employment of most of these individuals with Interstates ended by mid-April 2012, Julio Juarez continued working for Interstates through August 20.

Between January 9, 2012 and February 27, 2012 Aerotek placed 10 apprentices with Interstates at a wage rate of between \$14 and \$18.50 per hour. While most of these assignments ended in March and April, Rodgina Miller worked for Interstates through Aerotek from January 9, to July 9, 2012, Jt. Exh. 4. On July 9, Miller went on the Interstates payroll, Exh. R-16.

Some other employees placed by Aerotek became permanent employees of Interstates after a period of time on the Aerotek payroll. These include Carter Kemp, placed by Aerotek on August 30, 2011, who went on the Interstates payroll on February 10, 2012; Mark Meisenbach who became an Interstates employee on March 24, 2012; and Mike Miodowski who became an Interstates employee on April 14, 2012.

None of the four alleged discriminatees in this case was ever contacted by Aerotek with a view to offering them employment with one possible exception. On February 24, 2012 Aerotek recruiter Curtis Coatman was assigned for one day to find candidates for the Interstates job. He left a telephone voice mail message for Tim Hendershot informing him of an open journeyman position and sent Hendershot an email. The message and email instructed Hendershot to call Coatman if he was interested in the position, G.C. Exh. 48 and R Exh. 27. Hendershot's testimony that he called twice and left messages for Coatman is uncontradicted. I therefore credit it. Coatman did not work on the Interstates account on any day other than February 24.

One reason given by Respondent for failing to hire the 4 alleged discriminatees or follow-up on their applications is that their prior work history indicated that they made been paid too much in the past for them to "fit" the positions Aerotek was seeking to fill. In fact Aerotek hired a number of employees who had made \$30 or more on prior jobs.

Examples of employees placed by Respondent at wage rates considerably below what the employee had earned in the past are as follows: Julio Juarez, placed with Interstates on February 20, 2012 at a wage rate of \$25 per hour, had been paid \$30 an hour with two prior employers. Duane North, who Aerotek attempted to place, also earned \$30 per hour with a prior employer. John Tonn, who was placed by Aerotek with Concrete Equipment at \$13 per hour, apparently left the Union in September 2010. With the Union he had been paid over \$30 per hour when employed, Jt. Exh. 4, G.C. 3, p. 137. These past wage rates were reflected on their résumés or applications.

Aerotek also placed journeymen in apprentice positions. Jason Darnold, who was placed at Interstates at \$16 per hour, had earned \$23 per hour in prior employment as a journeyman. Similarly, Respondent placed Charles Christman, who also represented himself as a journeyman electrician, as an apprentice with Interstates at \$16 per hour.

On March 9, 2012, Brett Johnson sent Aerotek recruiter Dan Mehmen a letter informing him that eight of the Aerotek employees on the Interstates project were volunteer organizers for Local

22. These employees are Adrian Sterns, Carlos Ramos, Steve Meling, Kelly Jansen, Jimmy Coats, David Erwin, Jack Shelly and Jason Perry, G.C. Exh. 43.⁶ Brett Johnson testified that there may have other Local 22 members or sympathizers on the project whose relationship to the Union was never disclosed. On March 30, Johnson filed a petition with the Board to represent all journeymen and apprentice electricians working in the construction field employed out of Aerotek's Omaha, Nebraska office, excluding supervisors and low-voltage technicians, G.C. Exh. 44.

5

10

15

20

25

30

At trial Jacob Shank testified that he was aware that a number of the employees placed at Interstates had a relationship with Local 22 when they were hired. I discredit that testimony. In an affidavit given to the Board on May 8, 2012, during the investigation of the Local 22 charges, Shank stated that he first learned that there were employees at Interstate affiliated with the Union when Aerotek recruiter Kristin Breon⁷ told him that Brent Burnham was complaining of harassment at the Interstate project by union supporters, Tr. 113. In recanting from this statement, Shank did not adequately explain what led him to make it in the first place.⁸

Breon testified that she was not aware of the union affiliation of any employee she placed until April 2012, Tr. 525-26. One of the employees she placed on the Interstates job was union salt David Erwin on February 27, Tr. 524-25, Jt. Exh. 4.

Breon also testified that her account manager, Jacob Shank, reviewed and approved the candidates she selected before they were submitted to Interstates or other employer, Tr. 528. However, she did not specify what that review entailed. There is no evidence that Shank examined any of the résumés or written applications of any applicants who were selected for placement by Respondent's recruiters, prior to their placement.

In preparation for the instant trial, Jacob Shank prepared Exhibit R-16, which with his testimony, constitutes Respondent's evidence that it knowingly placed Local 22 members or supporters with Interstates. I find that this is not so. In any event, no applicant placed by Respondent indicated that they were a volunteer union organizer, as did the alleged discriminatees. In the control of the co

⁶ G.C. Exh. 43 bears a date of February 9, 2013. I credit Brett Johnson's testimony that this is a typographical error and the letter should have been dated March 9. 7 of the 8 salts, all except Ramos, had not been hired as of February 9.

⁷ Breon's name is now Kristen Kruse. I will refer to her as Kristin Breon, the name by which the job applicants knew her.

⁸ Burnham did not work at the Interstates project until February 23. I find that Shank was not aware that any of the employees placed at Interstates had a relationship with Local 22 at the time they were placed with Interstates.

⁹Earlier in this decision I discredited Dan Mehmen's testimony that he understood that Joe Stock was affiliated with the Union when he placed Stock at Fremont Electric.

¹⁰ On the other hand Respondent did place Andrew Stock with an client in April 2012, after he had demonstrated his union sympathies. Recruiter Jason Brandau attempted to contact union salt David Erwin in August 2012. However there is no evidence as to whether Brandau was aware of Erwin's union affiliation, Resp. Exh. 31.

The alleged Section 8(a)(1) violations: alleged prohibition against employees discussing wages

It is undisputed that Aerotek recruiters Kristin Breon and Linsey Rohman told or asked several employees not to discuss their wages with other employees, G.C. Exh.- 49, Tr. 522, 542. Respondent contends that it did not violate the Act because these recruiters were not acting as agents of Aerotek when they make these statements, that these statements are not rules or policies of Aerotek and the employees were not disciplined or threatened with discipline.

5

25

30

35

40

45

Respondent's employee handbook, Resp. Exh. 29 at pp. 7-8 states that an employee may be disciplined or terminated for a number of offenses, including "Disclosing business "secrets" or confidential information." Breon, in her March 5, 2012 conversation with employee David Erwin, told Erwin that "Pay is confidential." Rohman asked employees Carlos Ramos, Mike Miodowski and Adrian Sterns to keep their wages confidential. When account manager Jacob Shank was asked at trial whether Aerotek treats employees' salaries as confidential, he replied, "No, not necessarily." Shank testified further that he was not aware whether or not Aerotek had a rule against employees talking about their wages with other employees and that he recommends that recruiters not say that to employees, Tr. 142-43. Thus, it is clear that neither Breon nor Rohman violated any company rule in telling employees that their wages were confidential and that they should not be discussing their wages with others.

Respondent contends that Breon and Rohman were not acting on behalf of Respondent because they were simply trying to make their jobs easier. Assuming that were the case, they did not inform the employees that they were merely requesting a personal favor. From an objective standpoint, any reasonable employee would believe that Breon and Rohman were conveying company policy.

Analysis

Refusal to Consider/Refusal to Hire: The legal framework

This is what is commonly referred to as a salting case. There are a number of cases under the Act that apply to salting cases and thus establish the framework for considering the facts of this case. The most important of these cases are:

NLRB v. Town & Country Electric, Inc., in which the Supreme Court, noting the considerable deference accorded to the Board's interpretation of the Act, affirmed that the Board could lawfully construe the Act's definition of "employee" to include paid union organizers. 516 U.S. 85, 94–95, 98 (1995).

FES, 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002). In FES, Board held that:

To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), first show the following at the hearing on the merits: (1) that the respondent was hiring, or had

concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

10

15

5

The FES framework was modified by the Board in *Toering Electric Co.*, 351 NLRB 225, 232-34 (2007).¹¹ The Board found that in salting cases, the General Counsel bears the ultimate burden of proving the applicant's genuine interest in employment. This burden has two components: 1) that there was an application for employment; and 2) that if the employer contests the applicant's actual interest employment, the General Counsel must prove by a preponderance of the evidence that that the applicant was genuinely seeking to establish an employment relationship with the employer.

20

Another case which is not directly applicable to the proceeding on the merits before me, but which obviously has great bearing on the litigation posture of this is case is *Oil Capitol and Sheet Metal*, 349 NLRB 1348 (2007). In that case the Board held that the General Counsel, as part of his existing burden of proving a reasonable gross backpay amount due, must present affirmative evidence that the salt/discriminatee, if hired, would have worked for the employer for the backpay period claimed in the General Counsel's compliance specification.

25

Aerotek was hiring; all four alleged discriminatees applied for work with Aerotek and were genuinely interested in employment. All four had training and experience relevant for the jobs for which Aerotek was hiring.

30

35

I conclude that, applying the standards set forth in *FES and Toering*, the General Counsel has established that Respondent violated Section 8(a)(3) and (1) in refusing to consider for hire and refusing to hire Brett Johnson, Tim Hendershot, Alan Winge and Tim Jankowski. Respondent has not met its burden of showing that it would not have hired the alleged discriminatees even in the absence of the indication that they intended to engage in organizing activity. Aerotek placed numerous employees after the four discriminatees applied for employment at Aerotek. All four were licensed electricians with experience and training relevant to virtually all these jobs. ¹² Although Aerotek contests the discriminatees' interest in the available jobs, I conclude that the General Counsel has met its burden under *Toering*. ¹³

¹¹ The same day that the Board issued its decision in *Toering*, it issued a decision in *Tradesman, Inc.*, 351 NLRB 399 (2007) in which the employer's business was virtually identical to that of the Respondent in this case.

¹² Respondent concedes as much at page 20 of its brief.

¹³ Respondent's argument at pages 20-22 of its brief, that the alleged discriminatees were included in Aerotek's hiring process, is somewhat inconsistent with its position that they were not genuinely interested in employment and its argument that Winge never applied to work at Aerotek.

In finding that all four were interested in the posted jobs, I rely on the fact that Hendershot, Winge and Jankowski were unemployed or underemployed at the time of their application to Aerotek and have worked in their trade when jobs became available. I also rely on the fact that at least 8 other union members worked as salts for the companies to which they were sent by Aerotek. As to Johnson, he has demonstrated his willingness to work for non-union companies in furtherance of his organizing goals, as demonstrated by his completion of a job assignment with Tradesman in March 2011, Tr. 232-34, G.C. Exh. 41.¹⁴

5

10

15

20

25

30

35

Respondent's reliance on the *Toering* decision in arguing that Winge did not apply for employment with Aerotek is misplaced both factually and legally. The Board stated in *Toering* that the fact that applications are submitted in batch, is not in and of itself sufficient to destroy genuine applicant status, if the submitter has the requisite authorization from the individual applicants, 351 NLRB AT 233 n. 51. Respondent does not contend that Johnson had no such authorization from Hendershot and Jankowski. However, Respondent contends that Johnson was not authorized to submit Winge's application to it. However, one week prior to the submission, Winge authorized Johnson to submit his resume to Sentry Engineering and any other salting targets of the Union. Given that fact that Winge was unemployed at the time, I conclude that Winge, through Johnson, did in fact apply for employment at Aerotek.¹⁵

Hendershot's genuine interest in employment is established in part by his uncontradicted testimony that he attempted to respond to Curtis Coatman's call twice and left voicemail messages to which he received no response.

The General Counsel made an initial showing of discrimination which was not rebutted by Respondent.

I infer discriminatory motive from several factors. First, that Respondent made no attempt to place any employee who indicated that they were a voluntary organizer, with the exception of what appears to be Curtis Coatman's accidental contact with Hendershot. I infer that Coatman's call was accidental and not meant to be an attempt to place Hendershot from the fact that Respondent neither contradicted Hendershot's testimony that he replied to Coatman nor offered an explanation for that fact that it did not return his subsequent telephone calls.

I find Respondent's explanation for failing to contact Johnson, i.e., his wage history, to be pretextual and further evidence of discriminatory motive. First of all, Respondent does not

¹⁴ On October 27, 2011, Recruiter Dan Mehmen asked Johnson if he was interested in a foreman's position when Johnson, using an alias, called Mehmen to give a reference for another union salt. Johnson did not follow up on that offer, Tr. 283—84, Exh. R-25. I conclude that Johnson's failure to express interest in a foreman's position, mentioned to him under an assumed name, has no bearing on whether he had a genuine interest in offers of employment made in response to applications made in his real name.

¹⁵ The fact that Winge showed up at the hearing and testified as to his interest in placement by Aerotek is one of many factors that distinguishes his case from that of the employees discussed in *Toering* at 351 NLRB page 234. Other factors are that he was unemployed and that the resume submitted to Aerotek was current. I would also note that Respondent entered Winge into its RWS database on August 12, 2012, G.C. 34. He thus became a potential candidate for any position available through Aerotek, Tr. 443, 558-560, 590. Respondent's placement and maintenance of Winge's name in RWS (see Respondent's brief at 22) is inconsistent with its contention that he is not a job applicant with Aerotek.

have a rule or policy against placing employees in jobs lower than their prior wages, Tr. 211-12. Secondly, Respondent in fact placed several employees in jobs paying considerably less than they had earned previously. Thus Respondent did not show that it lawfully refused any of the alleged discriminatees based on a consistently applied wage comparison policy, *Tradesman International*, 351 NLRB 579, 582-83 (2007).

In the end result, Respondent has not offered any credible non-discriminatory explanation for failing to place the four discriminatees in the many jobs that were available to them. The reasons Respondent gives for failing to consider or hire Jankowski, Hendershot and Winge are totally lacking in specifics, Tr. 102-05. Thus, for Jankowski and Hendershot, Jacob Shank speculated that they were not hired "probably" due to timing rather than lack of qualifications. I infer discriminatory motive from the fact that Respondent bypassed the discriminatees in favor of employees who were not more qualified and probably, in some cases, clearly less qualified, *Flour Daniel, Inc.*, 350 NLRB 702, 705-06 (2007).

15

20

10

5

I also infer discriminatory motive from the disparate way Respondent treated the applications of the four discriminatees as opposed to those of David Myhr and Jeffrey Thomsen. On August 8, Jacob Shank told Brett Johnson that Respondent was only seeking to place apprentices. On August 19, Shank knew that Fremont Electric wanted two journeymen electricians. Recruiter Dan Mehmen attempted to contact David Myhr on August 24 and then reached him and Jeffrey Thomsen on August 26. Myhr and Thomsen were placed with Fremont on August 30 and 31, respectively. Respondent has not offered any explanation as to why it did not attempt to inform any of the discriminatees of the openings for journeymen at Fremont, or why it placed Myhr and Thomsen at Fremont instead of the discriminatees, G.C. Exhs. 9, 10 and $11.^{16}$

25

30

With regard to Winge, Respondent offered no reason for its failure to contact him. Shank was also unable to definitively state the reason Brett Johnson was not placed with one of Aerotek's customers, Tr. 196. Without such an explanation, I conclude that Aerotek failed to consider the discriminatees for hire or place them with their customers because they indicated that they intended to organize after they were hired. Even if Respondent knowingly hired several union members or supporters, which I find it did not, that would not negate the strong evidence that it discriminated against Hendershot, Winge, Jankowski and Johnson because of their declared union organizer status, *Hi-Tech Interiors, Inc.*, 348 NLRB 304 (2006).

35

40

Respondent's disabling conflict argument

On February 29, 2012, Brett Johnson and another Local 22 representative visited the offices of Interstates Electric in Omaha and met with Interstates Manager Lee Heitmann. Johnson told Heitman that IBEW members were working on Interstates' Tyson Foods job. He then offered to "cut out the middleman" and refer electricians directly to Interstates. Heitmann declined the offer. On March 7, Johnson called the owner of Interstates and offered the union's direct assistance in furnishing manpower to the Tysons Foods job, Resp. Exh. 23, Tr. 267.

¹⁶ Dan Mehmen, did not, for example, testify that he placed the most recent applicants or that Myhr and Thomsen were more qualified than the discriminatees, which in any event does not appear to be the case.

Respondent appears to contend that this conduct entitled it to deny employment to all four of the discriminatees. However, since it did not rely on this in failing to hire any of the four alleged discriminatees, it cannot defend against the allegations in the complaint on this basis, *Aztech Electric Co.*, 335 NLRB 260, 265 (2001). Moreover, there is no basis for denying Winge, Hendershot and/or Jankowski instatement or a full backpay remedy on the basis of misconduct on the part of Brett Johnson, *Crown Plaza LaGuardia*, 357 NLRB 95 (2011) and cases cited therein. However, whether Brett Johnson's backpay should be tolled and/or whether Respondent should be required to "instate" Johnson is a different issue,

10

5

In *North American Dismantling*, 341 NLRB 665 (2004) the Board found an employee was not entitled to reinstatement and limited his backpay due to his employer's awareness that the employee had attempted to steal work from the Respondent.¹⁷ Under a strict reading of Board precedent, there is no basis for denying Brett Johnson instatement or limiting Respondent's backpay liability because there is no evidence as to when Aerotek became aware of Johnson's solicitation of Interstates' business prior to the second day of the instant hearing (October 30, 2012) and there is no testimony by Respondent that it would have refused to hire him on that basis, *Smucker Co*, 341 NLRB 35 (2004).

20

15

The Board in *Smucker Co.*, relied in part of the testimony of Smucker's human resources manager that he would have deemed the discrinimatees' employment application invalid had he known that they had cheated on their pre-employment skills test. The Board did not specifically reject Judge Schlesinger's conclusion that the discriminatees' conduct was "*Malum in se.*" (conducted generally regard as wrong regardless of whether it has been expressly prohibited by statute or other means).

25

30

I conclude that Johnson's conduct in attempting to exclude Aerotek from Interstates work is so obviously inconsistent with the duties of an employee that his backpay should be tolled as of February 29, 2012, when he visited Interstates' office. On the other hand, neither Winge, Hendershot nor Jankowski engaged in any activity that is unprotected and which would warrant Aerotek from discriminating against any of them now or in the future.

Respondent violated Section 8(a)(1) as alleged.

35

Linsey Rohman and Kristin Breon were agents of Aerotek when telling employees that their wages were confidential.

40

Board law regarding the principles of agency is set forth and summarized in its decision in *Pan-Oston Co.*, 336 NLRB 305 (2001). The Board applies common law principles in determining whether an employee is acting with apparent authority on behalf of the employer when that employee makes a particular statement or takes a particular action. Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question. Either the

¹⁷ Other cases in which the Board has found an employee's activities in competition with the employer to be unprotected are *ATC/Forsyth*, 341 NLRB 501 (2004), *Associated Advertising Specialists, Inc.*, 232 NLRB 50, 53-54 (1977) and *Kenai Helicopters*, 235 NLRB 931, 934-36 (1978).

principal must intend to cause a third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such a belief.

The Board also stated in *Pan-Oston, supra*, that the test for determining whether an employee is an agent of the employer is whether, under all the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and/or acting for management. The Board considers the position and duties of the employee in addition to the context in which the behavior occurred. It also stated that an employee may be an agent of the employer for one purpose but not another.

10

15

20

30

35

40

5

In the instant case there is no question but that employees speaking to Rohman and Breon about wages would reasonably believe that the two recruiters were speaking for Aerotek management and were conveying company policy. In communicating to employees that wages were confidential and that employees should not discuss them, Respondent, by Rohman and Breon, violated Section 8(a)(1) of the Act, *Freund Baking Co.*, 336 NLRB 847 (2001). The fact that employees were not disciplined nor threatened with discipline is irrelevant, *Independent Stations Co.*, 284 NLRB 394, 396-97 (1987); *Cintas Corp.*, 344 NLRB 943, 945-46 (2005). The communication of such a rule or policy violates Section 8(a)(1). It is clear from the record also that Rohman and Breon had no reason to know that they were not communicating company policy, assuming that was the case.

Conclusion of Law

Respondent violated Section 8(a)(3) and (1) by refusing to consider or hire Brett

Johnson from about August 1, 2011 to February 29, 2012, and refusing to consider for hire and refusing to hire Tim Hendershot, Tom Jankowski and Alan Winge since about September 1, 2011.

Respondent violated Section 8(a)(1) in telling employees that wages were confidential and are not be discussed with other employees.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily refused to hire Brett Johnson, Tim Hendershot, Tom Jankowski and Alan Winge, it must make them whole for any loss of earnings and other benefits, consistent with the Board's decision in *Oil Capitol and Sheet Metal*, 349 NLRB 1348 (2007), computed on a quarterly basis less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest compounded daily, *Kentucky River Medical Center*, 356 NLRB No. 8 (October 22, 2010) as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).¹⁸

45

¹⁸ With regard to Brett Johnson this obligation is tolled as of February 29, 2012.

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee(s) for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

5

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended 19

ORDER

10

15

30

35

40

The Respondent, Aerotek, Inc., its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Refusing to consider for employment or refusing to hire any job applicant because the applicant is a union organizer or seeks union representation.
- (b) Telling any employee that wages are confidential and are not to be discussed with others.
- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
 - 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days of the Board's Order, offer immediate employment to Tim
 Hendershot, Tom Jankowski and Alan Winge in the positions for which they applied, or, if such positions no longer exist, to substantially equivalent positions.
 - (b) Make Tim Hendershot, Tom Jankowski and Alan Winge whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the Board's decision. Make Brett Johnson whole through February 29, 2012.
 - (c) Within 14 days of the Board's Order, remove from Respondent's files any reference to the unlawful refusal to hire Tim Hendershot, Tom Jankowski and Alan Winge and within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them will not be used against them..
 - (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

¹⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Within 14 days after service by the Region, post at its Omaha, Nebraska facility copies of the attached notice marked "Appendix." ²⁰ Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 2011.

In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 11, 2013

25

Arthur J. Amchan Administrative Law Judge

30

5

10

15

20

²⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT refuse to consider for hire or refuse to hire any job applicant because we believe that they intend to try to organize employees.

WE WILL NOT tell employees that they are not to discuss wages with others.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, offer immediate employment to, Tim Hendershot, Tom Jankowski and Alan Winge in the positions for which they applied, or, if such positions no longer exist, to substantially equivalent positions.

WE WILL make Tim Hendershot, Tom Jankowski and Alan Winge whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the Board's decision. WE WILL make Brett Johnson whole for any such losses through February 29, 2012.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful refusal to hire Tim Hendershot, Tom Jankowski and Alan Winge and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire him will not be used against them.

		AEROTEK, INC. (Employer)		
Dated	Ву			
		(Representative)	(Title)	

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

8600 Farley Street, Suite 100, Overland Park, KS 66212-4677

(913) 967-3000, Hours: 8:15 a.m. to 4:45 p.m. THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (913) 967-3014.